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Supreme Court, U.S.
FILED
051367 APR 24 2006
OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

JOHN L. SLOUP, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
ANDERSON M. GANSNER
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a police officer, during a lawful traffic stop, to have reasonable suspicion that contraband is present before asking the motorist questions related to contraband.

2. Whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

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PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

OPINIONS BELOW

The order of the Supreme Court of Illinois (App. 1a) denying the State's petition for leave to appeal is reported at 217 Ill. 2d 662 (2006). The opinion of the Appellate Court of Illinois (App. 2a-22a) is reported at 359 Ill. App. 3d 841, 834 N.E.2d 995 (2005).

JURISDICTION

The Appellate Court of Illinois entered judgment on September 2, 2005. The Supreme Court of Illinois denied the State's petition for leave to appeal on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ."

STATEMENT

Respondent was charged with a drug offense and filed a motion to suppress, arguing that the search of his vehicle during a traffic stop violated the Fourth Amendment. The state trial court denied the motion and, after a bench trial, entered a judgment of conviction. The Illinois Appellate Court reversed. Implementing settled Illinois precedent, and deepening an existing conflict among the lower courts, the appellate court held that the police officer exceeded the permissible scope of

the traffic stop when, without reasonable suspicion that contraband was present, he asked respondent for consent to search his car.

1. Officer Opelt of the Westmont police department observed a Buick commit traffic violations. Opelt effected a traffic stop, exited his car, approached the Buick, and asked the driver (respondent) for his driver's license and proof of insurance. Respondent complied, and Opelt found nothing amiss upon running the customary checks. App. 3a. Opelt then asked respondent whether he was under the influence of any "street drugs," and respondent said no. Opelt then requested consent to search the car, and respondent assented. During the search, Opelt found a pipe used to smoke crack cocaine. App. 3a-5a.

2. After being charged with unlawful possession of a controlled substance, respondent moved to suppress the evidence found in his car. The trial court denied the motion, reasoning that the initial stop was based upon probable cause and that Officer Opelt never exceeded the permissible scope of the stop. After a bench trial, the trial court found respondent guilty and sentenced him to probation. App. 5a-6a.

3. The state appellate court, over a dissent, reversed respondent's conviction on the ground that the trial judge erred in denying his motion to suppress. App. 2a-22a. Citing *People v. Gonzalez*, 204 Ill.2d 220, 789 N.E.2d 260 (2003), the majority noted that Officer Opelt's conduct at the traffic stop would be governed by *Terry v. Ohio*, 392 U.S. 1 (1968), and in particular by the three-part inquiry articulated in *Gonzalez* for determining whether that conduct satisfies *Terry*. App. 6a-7a. The court first determined that Opelt's request for respondent's consent to search his car was not related to the purpose of the stop. App. 10a-11a. The court next determined that Opelt did not have a reasonable suspicion of criminal activity that would justify the request for consent. App. 11a. Finally, the court

found that Opelt's question changed the fundamental nature of the stop. App. 12a. For these reasons, the court held that the request for consent exceeded the permissible scope of the stop under the Fourth Amendment and warranted reversal of respondent's conviction. App. 12a-14a. In so holding, the court expressly declined to address whether the request for consent impermissibly prolonged the stop. App. 12a.

In dissent, Presiding Justice O'Malley agreed that the *Gonzalez/Terry* framework governed Officer Opelt's conduct at the traffic stop, but concluded that Opelt's request for consent was justified by reasonable suspicion that respondent was under the influence of drugs. App. 15a-22a.

4. The Illinois Supreme Court denied the State's petition for leave to appeal. App. 1a.

REASONS FOR GRANTING THE PETITION

Courts across the Nation have long been deeply split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking questions about matters unrelated to the justification for the stop, such as whether the motorist would consent to a search of the vehicle for contraband. Consistent with settled Illinois precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions. That holding, in addition to reflecting a deep and intractable split among the federal courts of appeals and state courts of last resort, is incorrect. Because a mere request for consent to search the vehicle, like any question relating to contraband, is not a search or seizure, the Fourth Amendment does not require a police officer to have reasonable suspicion that contraband is present before requesting such consent during a valid traffic stop. Put another way, a Fourth Amendment non-event (here, asking respondent for consent to search his car) cannot possibly violate the Fourth Amendment even if conducted during a

legitimate traffic stop. See *Illinois v. Caballes*, 543 U.S. 405 (2005).

This Court should grant certiorari to provide uniformity on this important and recurring question, and also to resolve the closely related matter — itself the subject of a deep and intractable split — of whether *Terry* principles govern police investigatory conduct during a probable cause-based traffic stop, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

I. This Court Should Resolve Whether The Fourth Amendment Requires a Police Officer, During a Lawful Traffic Stop, to Have Reasonable Suspicion that Contraband Is Present Before Asking A Motorist Questions Related to Contraband.

A. The Lower Courts Are Deeply and Intractably Split on the Question Presented.

Before the court below decided this case, numerous state courts of last resort and federal courts of appeals had considered the extent to which (if any) the Fourth Amendment prohibits police from asking a lawfully seized motorist questions related to potential contraband (drugs or guns) in the vehicle. The lower courts have reached conflicting results and remain hopelessly deadlocked.

At one end of the spectrum, some courts hold that a police officer at a probable cause-based traffic stop needs no independent justification to ask the motorist questions related to contraband. For example, in *State v. Akuba*, 686 N.W.2d 406 (S.D. 2004), the defendant was stopped for speeding; the officer asked the defendant for consent to search the vehicle; the defendant gave his consent; and the officer found 177 pounds of marijuana. *Id.* at 411. The state trial court suppressed the marijuana on the ground that the officer's request for consent

impermissibly expanded the scope of the traffic stop. *Id.* at 412. The Supreme Court of South Dakota reversed, reasoning that "[a]n officer need not have reasonable suspicion that a vehicle contains contraband before asking to search it." *Id.* at 417.

Many other courts have likewise held that the Fourth Amendment does not require officers to have reasonable suspicion that contraband is present before asking contraband-related questions of a motorist detained at a lawful traffic stop. See, *e.g.*, *United States v. Martin*, 422 F.3d 597, 601-602 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1181 (2006); *United States v. Muriel*, 418 F.3d 720, 725-726 (7th Cir. 2005); *United States v. Burton*, 334 F.3d 514, 518-519 (6th Cir. 2003), *cert. denied*, 540 U.S. 1135 (2004); *United States v. Childs*, 277 F.3d 947, 950-954 (7th Cir.) (*en banc*), *cert. denied*, 537 U.S. 829 (2002); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993); see also, *e.g.*, *James v. State*, 102 S.W.3d 162, 173 (Tex. App. 2003); *State v. Boatman*, 185 Or. App. 27, 34, 57 P.3d 918, 921 (2002); *State v. Middleton*, 43 S.W.3d 881, 885 (Mo. App. 2001); *State v. Parkinson*, 135 Idaho 357, 362-363, 17 P.3d 301, 306-307 (App. 2000); *State v. Gaulrapp*, 207 Wis. 2d 600, 606-609, 558 N.W.2d 696, 699-700 (App. 1996), *rev. denied*, 208 Wis. 2d 213, 562 N.W.2d 603 (1997).

At the opposite end of the spectrum, other courts have held that the Fourth Amendment prohibits an officer from asking the motorist questions related to contraband absent reasonable suspicion that contraband is present. For example, in *Campbell v. State*, 97 P.3d 781 (Wyo. 2004), the defendant was stopped for a driving with an expired registration; the officer asked the defendant if there was any marijuana in the car; the defendant said no; the officer then asked for consent to conduct a canine sniff of the car; the defendant said yes; the canine alerted; and the ensuing search yielded eight pounds of marijuana. *Id.* at 783. The trial court denied the defendant's motion to suppress

the marijuana. On appeal, the defendant argued that the officer violated the Fourth Amendment by asking him drug-related questions without reasonable suspicion. The Supreme Court of Wyoming agreed and reversed the defendant's conviction, reasoning that "an officer generally may not ask the detained motorist questions unrelated to the purpose of the stop, including questions about controlled substances, unless the officer has reasonable suspicion of other illegal activity." *Id.* at 785.

Many other courts have likewise held that the Fourth Amendment requires law enforcement officers to have reasonable suspicion before asking contraband-related questions at a traffic stop. See, *e.g.*, *State v. Duran*, 138 N.M. 414, 120 P.3d 836, 844-846 (2005); *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (*en banc*); *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 514 U.S. 1134 (1995); see also, *e.g.*, *State v. Gibbons*, 248 Ga. App. 859, 863-864, 547 S.E.2d 679, 682 (2001); *State v. Taylor*, 126 N.M. 569, 575-577, 973 P.2d 246, 252-254 (App. 1998), *cert. denied*, 126 N.M. 534, 972 P.2d 353 (1999).

Still other courts, including the Illinois state courts, have adopted an intermediate approach, which asks whether the officer's question "impermissibly prolonged the [traffic stop] or changed the fundamental nature of the stop." *People v. Gonzalez*, 204 Ill. 2d 220, 235, 789 N.E.2d 260, 270 (2003) (citing *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part)); accord, *State v. McKinnon-Andrews*, 151 N.H. 19, 846 A.2d 1198, 1202-1203 (2004). Consistent with Illinois precedent, the court below followed this approach. App. 6a-7a (citing *Gonzalez*).

This conflict among the lower courts is intolerable, particularly in Illinois, where the outcome of particular cases depends entirely upon whether a prosecution takes place in state or

federal court. The Seventh Circuit in *Childs*, sitting *en banc*, held that the Fourth Amendment does not require officers to have reasonable suspicion that contraband is present before asking motorists questions concerning contraband during a traffic stop. See 277 F.3d at 950-954. Just over a year later, the Illinois Supreme Court in *Gonzalez* expressly rejected *Childs*, holding that Illinois state courts would impose more stringent Fourth Amendment limits on such questioning. See 204 Ill. 2d at 229-235, 789 N.E.2d at 266-270.

Thus, had this case been commenced, not by the State of Illinois in the Circuit Court of DuPage County, but by the United States in the District Court for the Northern District of Illinois, the Fourth Amendment analysis would have been governed by the Seventh Circuit's *en banc* opinion in *Childs*, not by the Illinois Supreme Court's opinion in *Gonzalez*, and the denial of respondent's suppression motion would have been affirmed, not reversed. Compare *Childs*, 277 F.3d at 950-954 (holding that police questioning unrelated to purpose of traffic stop does not violate Fourth Amendment), with *People v. Bunch*, 207 Ill. 2d 7, 15-17, 796 N.E.2d 1024, 1030-1031 (2003) (affirming the suppression of evidence after holding that questions unrelated to the traffic stop's purpose violated the Fourth Amendment), *cert. denied*, 541 U.S. 959 (2004); App. 6a-14a (same, applying *Gonzalez*); *People v. Leigh*, 341 Ill. App. 3d 492, 496-497, 792 N.E.2d 809, 812-813 (2003) (same); *People v. Lomas*, 349 Ill. App. 3d 462, 469-471, 812 N.E.2d 39, 44-46 (2004) (same). The fact that the outcome of Fourth Amendment challenges in this context depends upon whether the case proceeds in federal or state court presents a textbook example of a certworthy split. See R. Stern et al., *Supreme Court Practice* 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

The lower courts have expressly acknowledged this conflict over whether and, if so, to what extent the Fourth Amendment limits police questioning at traffic stops about contraband (or other matters unrelated to the traffic violation that justified the stop). See, *e.g.*, *Duran*, 120 P.3d at 844-846 (recognizing split and choosing sides); *McKinnon-Andrews*, 846 A.2d at 1202-1203; *Gonzalez*, 204 Ill. 2d at 228-235, 789 N.E.2d at 266-270 (same); *Childs*, 277 F.3d at 951-954 (same); see also *United States v. Garrido-Santana*, 360 F.3d 565, 574-575 (6th Cir. 2004) (recognizing split, but not choosing sides); *United States v. Purcell*, 236 F.3d 1274, 1279-1280 (11th Cir.), *cert. denied*, 534 U.S. 830 (2001); *Lockett v. State*, 747 N.E.2d 539, 542-543 (Ind. 2001) (same). Commentators likewise have recognized the importance of the issue and the split of authority. See Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 Fordham Urb. L.J. 1919, 1920 (2003) (issue arises "frequently"); Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 Tul. L. Rev. 211 (2001).

In sum, the conflict over whether and, if so, to what extent the Fourth Amendment prohibits police officers at probable cause-based traffic stops from asking questions relating to contraband is important, deep, intractable, and ripe for consideration. See *Childs*, 277 F.3d at 954 ("What happened here must occur thousands of times daily across the nation: Officers ask persons stopped for traffic offenses whether they are committing any other crimes."). This case presents an ideal vehicle for the Court to resolve that question.

B. The Fourth Amendment Does Not Require Police To Have Reasonable Suspicion That Contraband Is Present Before Asking Questions About Contraband During A Traffic Stop.

The Fourth Amendment requires that every search or seizure be "reasonable," which typically requires "individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). This Court, however, has long recognized that "mere police questioning does not constitute a seizure," and therefore that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual * * * and request consent to search his or her luggage." *Id.* at 435.

When a motorist is temporarily seized at a traffic stop, brief questioning does not effect an incremental search or unduly prolong the seizure, and therefore does not violate the Fourth Amendment. See *Childs*, 277 F.3d at 951. A contrary conclusion would lead to an anomaly — officers could not ask motorists detained at a traffic stop questions unrelated to the violation that prompted the stop, but could ask *any* questions of persons not in custody, see *Bostick*, 501 U.S. at 434, and questions unrelated to the charged offense of persons in formal custody, see *Texas v. Cobb*, 532 U.S. 162 (2001). Nothing in this Court's precedents supports such a distinction.

This Court's decision in *Illinois v. Caballes*, *supra*, confirms the point. *Caballes* considered whether the Fourth Amendment requires reasonable suspicion to justify using a drug-detection dog to sniff the exterior of a vehicle during a lawful traffic stop. 543 U.S. at 407. The Court held that no

reasonable suspicion was required, explaining that because the dog sniff did not "infringe[] [the motorist's] constitutionally protected interest in privacy," it did not "change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.* at 408. Because the officers did not extend the duration of the traffic stop to facilitate the dog sniff, *id.* at 407-408, the Court ruled that no Fourth Amendment violation had occurred, *id.* at 409-410.

Like the dog sniff in *Caballes*, the officers' question of respondent — a request for consent to search his car — did not constitute an independent search and therefore did not infringe her constitutionally protected privacy interests. See *Bostick*, 501 U.S. at 434-435; accord, *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 1471-1472 (2005). And as in *Caballes*, the court below did not find that the officers extended the duration of the stop to facilitate their questioning. App. 12a. Accordingly, the request for consent did not violate the Fourth Amendment.

II. This Court Should Resolve Whether The *Terry* Doctrine Governs Police Investigatory Conduct During A Lawful Traffic Stop Justified By Probable Cause, Where The Investigatory Conduct Is Unrelated To The Traffic Violation That Justified The Stop.

The conflict over the Fourth Amendment validity of asking contraband-related questions of motorists during traffic stops reflects, and in large measure mirrors, a methodological conflict over whether the *Terry* doctrine governs police investigatory conduct during a probable cause-based traffic stop, where the investigatory conduct is unrelated to the traffic violation that justified the stop. This conflict provides an independent ground for granting certiorari.

The Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate

the validity of unrelated police investigatory conduct at probable cause-based traffic stops. See *People v. Moss*, 217 Ill. 2d 511, 526-527, 842 N.E.2d 699, 709 (2005); *People v. Jones*, 215 Ill. 2d 261, 270-271, 830 N.E.2d 541, 549 (2005); *People v. Caballes*, 207 Ill. 2d 504, 508-509, 802 N.E.2d 202, 204 (2003), *vacated sub. nom, Illinois v. Caballes*, 543 U.S. 405 (2005); *People v. Harris*, 207 Ill. 2d 515, 522-524, 802 N.E.2d 219, 225 (2003), *vacated sub nom., Illinois v. Harris*, 543 U.S. 1135 (2005); *Bunch*, 207 Ill. 2d at 13-14, 796 N.E.2d at 1029; *Gonzalez*, 204 Ill. 2d at 228, 789 N.E.2d at 266 (declining to "distinguish between those cases in which the traffic stop is based on *Terry*'s 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause").

Several other state and federal courts use the same *Terry* approach. See, *e.g.*, *Duran*, 120 P.3d at 842-843; *People v. Williams*, 472 Mich. 308, 314, 696 N.W.2d 636, 640, *cert. denied*, 126 S. Ct. 734 (2005); *Campbell*, 97 P.3d at 784-785; *Holt*, 264 F.3d at 1230; *Purcell*, 236 F.3d at 1277; *United States v. Wellman*, 185 F.3d 651, 655-656 (6th Cir. 1999); *State v. Dickey*, 152 N.J. 468, 476, 706 A.2d 180, 184 (1998); see also *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003) ("an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship" during seizure incident to executing search warrant on a home) (emphasis in original), *vacated sub nom., Muehler v. Mena*, 544 U.S. 93 (2004).

Other courts, including the Seventh Circuit, have expressly rejected the view that the *Terry* doctrine governs unrelated investigatory conduct that occurs during a traffic stop justified by probable cause. See, *e.g.*, *United States v. Carpenter*, 406 F.3d 915, 916 (7th Cir. 2005); *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("it is inappropriate to treat investiga-

tions following traffic stops as governed by *Terry*, when the stop rests on probable cause to believe that an offense has been committed"); *Childs*, 277 F.3d at 952-954; *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (refusing to apply *Terry* doctrine to traffic stop predicated on probable cause: "A traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated."), *cert. denied sub nom., Alexander v. United States*, 528 U.S. 1161 (2000).

Two recent decisions from the Minnesota Supreme Court reflect the ongoing confusion in this area of the law. Four years ago, Minnesota aligned itself with those jurisdictions holding that "*Terry* principles are appropriately applied * * * when a motor vehicle is stopped for a routine equipment violation." *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). The Minnesota court (*id.* at 134) did so on the strength of *Berkemer v. McCarty*, 468 U.S. 420 (1984). The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" under *Miranda*. *Id.* at 423. In the course of ruling that such motorists are not "in custody" for *Miranda* purposes, *Berkemer* observed that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted). Based upon this language, the Minnesota court concluded that *Terry* governs police action at all traffic stops. *Wiegand*, 645 N.W.2d at 133-134. Accord, *e.g.*, *Wellman*, 185 F.3d at 656 (citing *Berkemer* for the same proposition); *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384 (same).

The Minnesota Supreme Court revisited this issue in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). *Askerooth* presented typical facts — the defendant was pulled over for committing a traffic violation; was discovered to have possessed illegal drugs; and unsuccessfully moved to suppress the drugs on the ground that the officer's actions violated the

Fourth Amendment. *Id.* at 356-359. The Minnesota court recognized that its prior decision in *Wiegand*, as well the Illinois Supreme Court's decision in *Gonzalez* and the Tenth Circuit's *en banc* decision in *Holt*, had held that "the *Terry* analysis applies *irrespective* of whether a stop for a minor traffic offense is based on reasonable suspicion or supported by probable cause." *Id.* at 360 (emphasis in original).

Two considerations, however, prompted the Minnesota court to reconsider. First, the court recognized that *Berkemer* had qualified the analogy it had drawn between traffic stops and *Terry* stops:

> "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

Id. at 360 (quoting *Berkemer*, 468 U.S. at 439 n.29). This qualification, the Minnesota court suggested, cast doubt on whether the *Terry* doctrine governs investigatory conduct at traffic stops justified by probable cause. *Ibid.*; accord, *Childs*, 277 F.3d at 953 ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29).

Second, the Minnesota court noted that "[w]hether *Terry* can still be applied to traffic stops supported by probable cause is uncertain in light of" *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). *Askerooth*, 681 N.W.2d at 360. *Atwater* held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The Minnesota court

interpreted *Atwater* as "remov[ing] Fourth Amendment reasonableness limitations from even a 'very minor' traffic stop when the stop is supported by probable cause." *Askerooth*, 681 N.W.2d at 361 (quoting *Atwater*, 532 U.S. at 354). Given its view of *Atwater*, and citing the Seventh Circuit's *en banc* decision in *Childs*, the Minnesota court declared itself "uncertain that *Terry* principles still apply to a court's determination whether a seizure during such a traffic stop can be unreasonable under the Fourth Amendment." *Ibid.*

There are other reasons, not cited by the Minnesota Supreme Court in *Askerooth*, to conclude that *Terry* does not govern unrelated investigatory conduct at probable cause-based traffic stops. The *Terry* doctrine requires that *Terry* stops — which need only be justified by reasonable suspicion — have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004). By contrast, as *Atwater* teaches, if there is probable cause to believe that a driver has committed a minor traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354; see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a traffic stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985); see also *Hiibel*,

542 U.S. at 188-189 As this Court has made clear, such fact-specific balancing is inappropriate when determining the validity of traffic stops supported by probable cause and of police conduct at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren v. United States*, 517 U.S. 806, 817-819 (1996); see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

Again, the point is confirmed by *Caballes*. The Illinois Supreme Court in *Caballes* applied *Terry* to evaluate the Fourth Amendment validity of conducting a canine sniff during a probable cause-based traffic stop. See *Caballes*, 543 U.S. at 418 (Ginsburg, J., dissenting) (citing *Caballes*, 207 Ill. 2d at 508, 802 N.E.2d at 204). Justice Ginsburg would have adopted a *Terry* analysis, see *id.* at 420-422, but recognized that the Court had "implicitly" rejected that approach, *id.* at 421.

As Justice Ginsburg correctly ascertained, the Court's opinion in *Caballes* rejected application of *Terry*, and instead rested upon the following principle — when a motorist is properly seized at a lawful traffic stop, the officer may conduct additional investigatory activities during the stop so long as those activities do not effect an incremental search or unduly prolong the seizure. See Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 Notre Dame L. Rev. 53, 66 n.52 (2005) ("The Supreme Court in *Caballes* apparently read the scope limitations out of the *Terry* test."); Kalnitz, *People v. Caballes: Illinois Search and Seizure Jurisprudence Fails to Pass the Sniff Test*, 17 DCBA Brief 8, 11 (July 2005) ("In light of *Caballes*, it is unclear if *Gonzalez* and other Illinois decisions are correct in holding that *Terry* requires courts to look at the duration of a stop as well as the manner in which it is carried out."); cf. *Muehler*, 125 S. Ct. at 1471-1472. The Court should take the opportunity in this

case to make explicit what is apparent, albeit implicit, in *Caballes*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
ANDERSON M. GANSNER
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

APRIL 2006

APPENDIX

Supreme Court of Illinois

No. 101420

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner, v.
JOHN L. SLOUP, Respondent.

January 25, 2006

Disposition of Petitions for Leave to Appeal

Denied.

No. 2–03–0992

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of DuPage County,
Plaintiff-Appellee,	)	
v.	)	No. 02 CF 3805
JOHN L. SLOUP,	)	Honorable Robert J. Anderson
Defendant-Appellant.	)	Judge Presiding

[FILED Sep 02 2005]

JUSTICE BYRNE delivered the opinion of the court:

Defendant, John L. Sloup, was convicted of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2002)). He appeals, arguing that the trial court erred in denying his motion to quash the arrest and suppress the drug paraphernalia seized from his vehicle after an early-morning traffic stop. We reverse.

FACTS

Officer Opelt of the Westmont police department was the only witness to testify at the hearing on the motion to quash the arrest and suppress the evidence. On direct examination by

defense counsel, Officer Opelt testified that, while on patrol at 3 a.m. on September 28, 2003, he spotted a Buick driven by defendant traveling in the left eastbound lane of 63rd Street near Cass Avenue. Officer Opelt observed the Buick weave in its lane a couple of times. The car touched but did not cross the yellow line. Officer Opelt saw the Buick pull within five or six feet of the rear bumper of another car that was traveling slowly in the same lane. The Buick passed the car on the right but did not signal a lane change until its tires had touched the white lines that divided the left and right eastbound lanes.

Officer Opelt stopped the Buick and ran a check on the license plate but found nothing of note. Officer Opelt exited his car and approached the Buick. Defendant, who was the only occupant, lowered his window. Officer Opelt did not detect an odor of alcohol or cannabis or see anything in plain view that would indicate criminal activity. He asked defendant to produce his driver's license and proof of insurance, and defendant complied. Officer Opelt returned to his squad, where he ran a check on defendant's license, again finding nothing amiss. Officer Opelt returned to defendant's car but did not return defendant's license to him.

Officer Opelt testified that, because he believed that defendant was acting unusually nervous for a routine traffic stop, he inquired about defendant's destination. Defendant replied that he was heading to the Omega Restaurant in Downers Grove. Officer Opelt asked defendant what street he was on. Defendant replied that he was on 75th Street and also volunteered that he lived on 75th Street. Officer Opelt told defendant that he was in fact on 63rd Street, and then asked defendant why he was traveling on 63rd Street to the Omega Restaurant. Defendant replied that his route was the quickest. Officer Opelt testified that the route defendant was taking to the Omega Restaurant "made absolutely no sense." Because defendant was heading in a "roundabout" way toward his destination, was

acting unusually nervous, and had committed the prior driving infractions, Officer Opelt suspected that defendant might have been "under the influence of something." However, Officer Opelt testified that during the conversation he "deemed it not necessary at that point to go ahead with the [field sobriety] tests." Officer Opelt conceded that, in his experience, nervousness is "not such a strong indicator" of intoxication.

Because Officer Opelt did not detect the odor of alcohol, he asked defendant whether he was under the influence of any "street drugs," and defendant replied in the negative. Defendant then volunteered that he had been recently released from drug rehabilitation for a heroin addiction and that he had remained clean since his release.

Officer Opelt suspected that defendant was under the influence of some substance but did not direct defendant to perform any field sobriety tests, because "[i]f [defendant] was under the influence of drugs, [Officer Opelt] didn't feel his condition was enough to warrant an arrest for driving under the influence of a controlled substance." Defendant was not free to leave, but Officer Opelt did not give *Miranda* warnings, because he believed that defendant was not under arrest. Officer Opelt testified that he observed no indications in defendant's physical appearance or demeanor that he was under the influence of drugs. Later in his examination, Officer Opelt acknowledged that only reasonable suspicion is needed to warrant field sobriety tests.

Approximately 10 minutes after the initial stop, Officer Opelt requested consent to search the vehicle, and defendant complied. Meanwhile, a backup officer arrived on the scene, and Officer Opelt asked defendant to step out of the Buick and stand with the backup officer during the search. Officer Opelt conceded that defendant had done nothing to make him fear an imminent attack. Officer Opelt found drug paraphernalia, a pipe used to smoke cocaine, under the front passenger seat of the

Buick. Officer Opelt testified that he asked for consent to search because he believed that "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle."

Upon cross-examination by the prosecutor, Officer Opelt testified that, at the time he asked to search the vehicle, he had not come to a "conclusion of 100 percent surety" of whether defendant was under the influence of drugs. Officer Opelt opined that the presence or absence of contraband in the vehicle would be relevant to determining whether defendant was indeed under the influence of drugs. Although Officer Opelt found the drug paraphernalia and believed that the discovery would be relevant to whether defendant was intoxicated, Officer Opelt never conducted field sobriety tests of defendant. Officer Opelt explained that his lack of training in driving-under-the-influence (DUI) drug detection contributed to his decision to refrain from testing defendant.

At the close of the hearing, defendant argued that there was no traffic violation on which to base the traffic stop, and alternatively, that defendant's consent to the search was tainted because Officer Opelt's request for consent to search the Buick was not reasonably related in scope to the circumstances that formed the basis for the stop. Defense counsel argued, "I think it's pretty clear that asking to search somebody's car for drugs has nothing to do with an alleged weaving within the lane and then [an alleged turn] signal [violation]." The trial court found Officer Opelt to be credible and held that defendant's erratic driving provided an adequate basis to stop him. The court further found that Officer Opelt never exceeded the scope of the stop.

Following a brief bench trial at which little additional evidence was presented, the trial court found defendant guilty

of unlawful possession of a controlled substance. Defendant timely appeals.

ANALYSIS

When reviewing a ruling on a motion to quash an arrest and suppress the evidence seized, our standard of review is usually twofold. *People v. Davis,* 352 Ill. App. 3d 576, 579 (2004). We accord great deference to the trial court's factual findings and credibility determinations and reverse those conclusions only if they are against the manifest weight of the evidence, but we review *de novo* the ultimate conclusion of whether suppression is warranted. *People v. Gherna,* 203 Ill. 2d 165, 175 (2003). Where the evidence is undisputed and the only matter challengeable is the trial court's legal conclusion, our review is *de novo. People v. Centeno,* 333 Ill. App. 3d 604, 616 (2002).

A vehicle stop constitutes a seizure of the vehicle's occupants and is therefore subject to the fourth amendment's requirement of reasonableness as developed in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *People v. Gonzalez,* 204 Ill. 2d 220, 226 (2003). Under *Terry,* a law enforcement officer may, within the strictures of the fourth amendment, conduct a brief, investigative stop of individuals, absent probable cause to arrest, provided the officer has a reasonable, articulable suspicion of criminal activity. *Gonzalez,* 204 Ill. 2d at 227. If a detention exceeds what is permissible as a *Terry* investigative stop, a subsequent consent to search may be found to be tainted by the illegality, and the fruits of the search may be suppressed. *People v. Brownlee,* 186 Ill. 2d 501, 519 (1999).

A *Terry* analysis includes a dual inquiry: (1) " 'whether the officer's action was justified at its inception' " and (2) " 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Gonzalez,* 204 Ill. 2d at 228, quoting *Terry,* 392 U.S. at 19-20, 88 S.Ct. at

1879, 20 L.Ed.2d at 905. In the trial court, defendant argued that he committed no traffic offense and therefore the traffic stop was unjustified at its inception. The State has not cited any section of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2004)) or any other law that defendant might have violated at the time of the stop, and in fact, the trial court speculated that defendant did not violate any traffic law by touching the white lane lines while activating his turn signal. Nevertheless, the trial court found that defendant's "weaving or swerving in the lane" rendered the stop proper at its inception. We need not review this conclusion, because defendant has abandoned his argument that he did not commit a traffic violation. See 188 Ill. 2d R. 341(e)(7) (points not argued in appellant's brief are waived). For the purposes of this analysis, we conclude that the initial traffic stop did not violate defendant's fourth amendment rights.

Given defendant's concession that the stop was valid, we need consider only whether Officer Opelt's conduct complied with the second prong of the *Terry* analysis. The second prong is satisfied and the search is valid if (1) the questioning and search were reasonably related in scope to the circumstances that justified the interference in the first place; (2) the officer had a reasonable and articulable suspicion that criminal activity was taking place; or (3) the questioning and search did not impermissibly prolong the detention or change the fundamental nature of the stop. *Gonzalez,* 204 Ill. 2d at 235; *People v. Moore,* 341 Ill. App. 3d 804, 809 (2003) (the officer's question whether there was contraband in the *Terry*-stopped car and subsequent request to search car were subject to the *Gonzalez* requirements).

Defendant contends that none of the three alternatives was satisfied. He argues that (1) Officer Opelt's request to search the Buick for contraband was not related to the purpose for which he had stopped the Buick, that is, to determine whether

the driver was under the influence; (2) there was no independent reasonable and articulable suspicion justifying the request to search; and (3) Officer Opelt changed the fundamental nature of the stop, which was based on a suspicion of driving under the influence, when he began to investigate whether there was contraband in the Buick.

Our analysis is guided by *Moore,* in which this court recently applied the *Gonzalez* test. In *Moore,* the arresting officer and his partner stopped a car the defendant was driving after they observed it travel down the wrong side of the road at a high rate of speed. After the car came to a halt, the officer approached and conversed with the defendant, who sounded nervous and appeared to be shaking. While running a computer check on the defendant, the officer observed furtive movement from the car's five occupants, who looked liked they were trying to conceal something. Based on this movement, the number of passengers in the car, and the defendant's nervousness, the officer asked the defendant to exit the car. The officer performed a pat-down search of the defendant but found nothing. *Moore,* 341 Ill. App. 3d at 806.

The officer asked the defendant whether there was any contraband in the car, and the defendant replied that he was not aware of any. The officer ascertained that the car was owned by the parents of one of the passengers. The officer requested that passenger's permission to search the car, the passenger consented, and a handgun was discovered under the front passenger seat. By the time the search began, three or four other patrol units had arrived as backup. *Moore,* 341 Ill. App. 3d at 806-07. Later at the station, the officer issued the defendant a citation for improper lane usage. *Moore,* 341 Ill. App. 3d at 807.

We held that the officer's questions about contraband and request to search the car were reasonably related to the circumstances that prompted the stop, because "it was reasonable for [the officer] to suspect that the defendant may have been under

the influence of a controlled substance and/or alcohol, or that other criminal activity may have been in progress." *Moore,* 341 Ill. App. 3d at 810. In reaching this conclusion, we emphasized several facts that render this case distinguishable: the defendant was speeding down the wrong side of the road; the defendant lacked any identification or a driver's license; and the officer feared for his safety because the occupants were moving furtively and the defendant did not deny the possibility of weapons inside the vehicle. *Moore,* 341 Ill. App. 3d at 810. In this case, defendant's "weaving or swerving in the lane" and traveling within five or six feet of another car's bumper are much weaker indicators of driving while under the influence of drugs than the defendant's driving was in *Moore.* Furthermore, it is undisputed that in this case defendant produced a valid driver's license, did not exhibit any physical indicia of intoxication, and did not cause Officer Opelt to fear for his safety. It appears that the defendants in the two cases are similar only in their nervousness, which Officer Opelt conceded is "not such a strong indicator" of intoxication. The cumulative effect of these factors should have tempered Officer Opelt's intrusion.

"*Terry* recognized that officers can detain individuals to resolve ambiguities in their conduct, and thus accepts the risk that officers may stop innocent people." *Moore,* 341 Ill. App. 3d at 808, citing *Illinois v. Wardlow,* 528 U.S. 119, 126, 120 S.Ct. 673, 677, 145 L.Ed.2d 570, 577 (2000). It is evident from *Moore* that, under *Terry*'s second prong, which asks whether a request to search a *Terry*-stopped car is reasonably related in scope to the circumstances that justified the stop, the court is not limited to considering the situation as it existed at the precise moment the stop occurred. As the officer performs his routine duties following a traffic stop, which typically include questioning the driver about the circumstances leading to the stop and checking the driver's identification, the officer may make observations that justify further detention. Thus, in *Moore,* the circumstances we considered in determining

whether the request to search was proper included observations made by the officer as he was performing routine duties after the stop occurred. Such an approach correctly views traffic stops as evolving encounters where new facts continually emerge, feeding into the *Terry* calculus and justifying police action that only moments before would have been unlawful. However, a valid stop for a traffic violation does not grant the officer unfettered discretion to pursue an unarticulable hunch of criminal activity.

Consistent with these principles, we agree with the State that defendant's unexplained misidentification of his location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether defendant was under the influence of alcohol or drugs. However, Officer Opelt concluded that defendant's responses to the questioning rendered field sobriety tests unnecessary to the DUI investigation. Officer Opelt's conscious decision to forgo the field sobriety tests illustrates that the officer's conversation with defendant resolved the ambiguity in defendant's conduct. See *Moore*, 341 Ill. App. 3d at 808.

Officer Opelt's request to search the Buick would have been reasonably related to the circumstances that prompted the stop if his interaction with defendant had corroborated his initial suspicion that defendant might be under the influence. However, Officer Opelt observed no physical indicia of intoxication, and defendant denied that he was under the influence or possessed any contraband. Most notably, the officer asked to search the vehicle only after defendant volunteered that he had been recently released from drug rehabilitation. The stop and subsequent questioning were justified by defendant's driving and apparent disorientation, respectively. However, Officer Opelt's ultimate request to search the car was not reasonably related to the stop, because the questioning regarding defen-

dant's location and destination was not probative of whether contraband might be found in the car.

We further conclude that Officer Opelt's request to search the car was not justified by a reasonable and articulable suspicion of criminal activity. In *Moore,* the arresting officer testified that, when he returned to his squad car to check the status of the defendant's driver's license, he observed the defendant and his four passengers moving furtively, as if the occupants were trying to hide something. The officer described the movements as coming from the front seat to the backseat. We inferred from the officer's unrebutted testimony that either the defendant or the front passenger was moving something from the front seat to the backseat in an attempt to conceal it. *Moore,* 341 Ill. App. 3d at 811. In light of the perceived safety risk to the officer and the reckless driving, nervous behavior, and lack of identification, we concluded that the request to search the vehicle was justified based on the officer's reasonable, articulable suspicion of criminality. *Moore,* 341 Ill. App. 3d at 811.

This case is distinguishable from *Moore* on this point as well. Here, the traffic stop was supported by facts indicating that defendant might be under the influence. After stopping defendant, Officer Opelt asked him questions about his location and destination, and in responding to these questions, defendant showed unusual nervousness and signs of disorientation. However, neither defendant's behavior nor the visible areas of the car caused the officer to fear for his safety or suspect that defendant possessed contraband. In light of Officer Opelt's decision to forgo sobriety testing, it appears that his hunch regarding concealed contraband in the vehicle was based only on defendant's disclosure of his drug treatment. This suspicion is neither reasonable nor articulable, and therefore it does not justify the request to search the Buick.

We hold that Officer Opelt's request to search the Buick was neither reasonably related to the initial purpose of the stop nor supported by reasonable and articulable suspicion, and we further conclude that the third *Gonzalez* requirement was not satisfied because Officer Opelt's request changed the fundamental nature of the stop.

The State concedes that, if Officer Opelt was truly investigating whether defendant was under the influence of drugs, he should have simply directed defendant to perform field sobriety tests. We agree, and we further note that the officer might have looked for evidence of drug use by performing a pat-down search of defendant's person. When investigating whether a motorist is under the influence, field sobriety testing is more probative of intoxication than a search of the vehicle or even a pat-down search. The degree to which an officer resorts to less probative investigatory techniques, in this case a request to search a vehicle for evidence of the driver's intoxication, informs our analysis of whether the use of the technique fundamentally changed the nature of the stop. Under the facts of this case, we conclude that Officer Opelt's request to search the car for contraband was a fundamental shift from the purpose of the stop because, based on his interaction with defendant, it was unreasonable for Officer Opelt to suspect that there might be contraband in the Buick.

Only 10 minutes passed between the initial stop and the search, but we need not consider whether Officer Opelt's request to search the car impermissibly prolonged the stop, because we conclude that the request to search violated defendant's fourth amendment rights by fundamentally changing the nature of the stop. *Cf. Bunch*, 207 Ill. 2d at 17, 796 N.E.2d at 1031 (after concluding that the traffic stop was prolonged impermissibly, the supreme court did not decide whether the officer's conduct changed the fundamental nature of the stop).

Defendant argues that *People v. Hall,* 351 Ill. App. 3d 501 (2004), supports his contention that his rights were violated under *Gonzalez.* We agree. In *Hall,* two officers stopped the defendant because his car's headlight was not functioning. One of the officers informed the defendant of the basis for the stop and then asked for and obtained the defendant's driver's license and proof of insurance. Finding no outstanding warrants, the officer returned the license, issued a verbal warning, and told the defendant he was free to go. The defendant then asked whether he might be pulled over again for the malfunctioning headlight. The officer responded that it was possible that other officers might pull him over. *Hall,* 351 Ill. App. 3d at 502.

The officer then asked the defendant whether he had alcohol, drugs, or weapons in the vehicle. The defendant replied that he did not. The officer asked for permission to search the vehicle. The defendant refused, stating that he was in a hurry to get home. After the defendant refused to allow the search, the officer noticed a package of cigarette-rolling papers and several plastic "baggies" in the defendant's shirt pocket. The officer asked the defendant to step out of the vehicle. After the defendant did so, the officer ordered him to hand over the items in his shirt pocket. The defendant complied, and the officer found no contraband. The officer then searched the vehicle but found nothing illegal. The officer searched the defendant's pants pocket and, finding marijuana, the officer arrested the defendant. The trial court found that the defendant was unconstitutionally seized when the officer searched the vehicle and the defendant's person. *Hall,* 351 Ill. App. 3d at 502.

On appeal, the State argued that the detention and search were legal under *Gonzalez.* This court disagreed, concluding that the officer exceeded the scope of the *Terry* stop by questioning the defendant about contraband and asking for permission to search the vehicle after telling the defendant that he was free to leave. We concluded that none of the *Gonzalez* prongs

was satisfied because (1) the "questions [about contraband] were clearly unrelated to the initial purpose of the stop, the nonfunctioning headlight"; (2) there was no reasonable and articulable suspicion justifying the questioning, because the officer observed the cigarette papers and "baggies" after the questioning began; and (3) the purpose of the stop was completed when the officer gave a warning and told the defendant that he was free to go; thus, further questioning impermissibly prolonged the stop and was simply a "fishing expedition" that changed the fundamental nature of the stop. *Hall,* 351 Ill. App. 3d at 504-05.

Hall provides guidance in our analysis of the *Gonzalez* test. In *Hall,* neither the traffic violation for which the defendant was stopped nor anything observed by the officer during his initial interaction with the defendant could have aroused any reasonable suspicion that the defendant was harboring contraband in his car. Thus, the officer in *Hall* had no basis for asking the defendant whether there was contraband in the car. In this case, Officer Opelt stopped defendant on the suspicion of driving under the influence. However, by the time Officer Opelt asked for permission to search the Buick, he had already concluded that defendant did not manifest any physical indicia of intoxication and deemed it unnecessary to administer field sobriety tests. Yet Officer Opelt asked to search the vehicle after deciding that "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle." The officer's own testimony illustrates that his request to search the vehicle was a shift from investigating a traffic violation to investigating drug possession.

For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed.

McLAREN, J., concurs.

Presiding Justice O'MALLEY, dissenting:

First, I express my agreement with the majority that the *Terry/Gonzalez* factors must be applied with due regard for the evolving nature of traffic stops. In considering the overarching question of whether police conduct that occurs after the *Terry*-stop of a car is reasonably related in scope to the circumstances that led to the stop, a court may and must consider not only those circumstances that arise before and at the time the traffic stop is effected, but also those that arise afterward, up to the point the police action in question occurs.

By the time Officer Opelt asked defendant for permission to search his car, defendant had (1) weaved within his lane of traffic, failed to signal a turn, and followed another car too closely, all while taking a circuitous route toward his destination, via a street that he erroneously thought was the street on which he lived; (2) acted unusually nervous during the traffic stop; and (3) volunteered that he had been recently released from drug rehabilitation for a heroin addiction. Based on these facts, Officer Opelt asked to search the car. He testified that he made the request because the presence of contraband in the car would corroborate his suspicion that defendant was under the influence of drugs.

The majority suggests that Officer Opelt must have been on a "fishing expedition," because he could have pursued his suspicion more efficiently by simply having defendant submit to field sobriety tests or to a pat-down search for drugs. The majority does not reveal what it believes Officer Opelt really thought during the interaction. Does the majority believe that Officer Opelt did not truly suspect that defendant was under the influence but offered the suspicion merely as a pretext for a search? Or does the majority believe that Officer Opelt's suspicion was actually firmer than he indicated, to the point that he concluded, at least provisionally, that defendant was indeed under the influence of drugs and that he might still have the

intoxicating substance in his possession? Of course, it is possible that Officer Opelt undertook the search with mixed rationales. Perhaps he was not so sure that defendant was intoxicated as to arrest him without further proof (which, he reasoned, might take the form of contraband itself), yet he was sure enough to suspect that a search of the car would reveal the contraband that might have intoxicated defendant. Thus, Officer Opelt might have believed that the presence of contraband in the car would follow from, and in turn reinforce, his suspicion that defendant was under the influence. Whatever the case, Officer Opelt's actions must be evaluated not by what he himself thought was justified, but by what was objectively justified. See, *e.g., People v. Gray,* 305 Ill. App. 3d 835, 839 (1999) (an objective test applies in determining justification under the fourth amendment, and the subjective intentions or beliefs of the officer are not dispositive). Rather than seek to hamstring the State with Officer Opelt's testimony, we must address the issue as framed by the State on appeal: "Was it reasonable for Officer Opelt to believe that a driver whom he suspected to be under the influence of a controlled substance might have some of that same substance in the car with him?" If, as *Terry* and its progeny require in our pursuit of what is objectively reasonable, we yield what is due the judgments of seasoned patrol officers like Officer Opelt, the answer will be "Yes."

The first *Terry/Gonzalez* prong asks whether the police action was reasonably related in scope to the circumstances that justified the interference in the first place. *Gonzalez,* 204 Ill. 2d at 235. The majority and I agree that "defendant's unexplained misidentification of his location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether defendant was under the influence of alcohol or drugs." Op. 359 Ill. App. 3d at 847. As for the request to search the car, the majority initially says that the request "would have been reasonably related to the circum-

stances that prompted the stop if [the officer's] interaction with defendant had corroborated his initial suspicion that defendant might be under the influence." Op. 359 Ill. App. 3d at 847-48. This statement of the requirements of *Terry/Gonzalez*'s first prong is misleading to the extent that it seems to require Officer Opelt to have had some quantum of evidence to warrant his request. It is the second prong of *Terry/Gonzalez* that requires an evidentiary link between the initial detention and the subsequent police conduct; the first prong requires merely a thematic link. See *Gonzalez*, 204 Ill. 2d at 236 (request for identification from passenger in *Terry*-stopped car did not relate to the traffic violation that was basis for stop); *Hall*, 351 Ill. App. 3d at 504 (officer's question to defendant whether he had any contraband in his car and subsequent request to search car "were clearly unrelated to the initial purpose of the stop, the nonfunctioning headlight"). Fortunately, however, the majority's analysis does not seem governed by this misleading statement, for the majority seems to suggest that the reason Officer Opelt's request to search the car was not reasonably related to the initial stop was not because Officer Opelt lacked an evidentiary justification for suspecting that defendant was under the influence, but because he really did not have that suspicion at the time he asked to search the car. The majority reasons that Officer Opelt's decision to forgo sobriety testing indicated that he no longer believed that defendant was under the influence. Op. 359 Ill. App. 3d at 848. The majority misreads the record. Officer Opelt dispensed with sobriety testing because he had concluded there did not exist the probable cause he mistakenly thought was needed for field sobriety tests (see *Village of Plainfield v. Anderson*, 304 Ill. App. 3d 338, 342 (1999) (only reasonable suspicion necessary for field sobriety tests)), not because he had abandoned his belief that defendant was under the influence. Officer Opelt's testimony plainly shows that, at the time he sought permission to search the car, he believed that defendant was under the

influence, based on his traffic infractions, obvious disorientation, and admitted recent release from drug rehabilitation. The majority has ventured no reason not to believe Officer Opelt's testimony. Thus, if the majority's doubts about Officer Opelt's sincerity are the only obstacle to its finding the first prong of *Terry/Gonzalez* satisfied, then the record must put that hesitation to rest. In any event, we need not divine Officer Opelt's thoughts, since the test for determining whether police action is justified under the fourth amendment is an objective one. See *Gray,* 305 Ill. App. 3d at 839.

Having said this, I cannot be sure the majority really believes that the reason Officer Opelt's request to search the car was not reasonably related to the initial stop was because his interaction with defendant did not, as the majority incorrectly puts it, "corroborate[ ] his initial suspicion that defendant might be under the influence" (op. 359 Ill. App. 3d at 848), for not five lines after this remark, the majority says, "Officer Opelt's ultimate request to search the car was not reasonably related to the stop because the questioning regarding defendant's location and destination was not probative of whether contraband might be found in the car" (op. 359 Ill. App. 3d at 848). Does the majority believe that the request to search the car was unreasonable because (1) defendant's answers to Officer Opelt's prior questions did not corroborate his suspicion that defendant was under the influence, or because (2) Officer Opelt's questions were not tailored enough to determining specifically whether defendant had contraband in the car? I addressed the soundness of rationale (1) above. If, in fact, rationale (2) is the intended rationale, then I cannot see why Officer Opelt would have had to ask defendant whether he had contraband in his car before asking to search the car. Both queries would have been based on a suspicion that defendant had contraband, and if, as the majority apparently believes, it was permissible for Officer Opelt to ask defendant if he had contraband in the car, then surely the officer could have dispensed with preliminaries and

simply asked to search the car. Defendant could have declined a request to search his car just as easily as he could have refused to answer a question about his possession of contraband.

There are flaws also in the majority's analysis under the third prong of *Terry/Gonzalez*, which asks whether the fundamental nature of the stop was changed. See *Moore*, 341 Ill. App. 3d at 810.

Here again the majority reads more into Officer Opelt's conduct than the record allows. The majority states that "[i]n light of Officer Opelt's decision to forgo sobriety testing, it appears that his hunch regarding concealed contraband in the vehicle was based only on defendant's disclosure of his drug treatment." Op. 359 Ill. App. 3d at 848. Again, Officer Opelt was quite clear that his suspicion was based on several factors, namely, defendant's driving infractions, disorientation, and admission to having undergone drug treatment recently. But even if Officer Opelt's "hunch" had been based solely on the drug treatment disclosure, that should not matter to our analysis. The correct analytical approach is whether a reasonable officer would have been influenced by the other foregoing factors, which I believe continued to influence Officer Opelt.

Later in the analysis, the majority finds yet more significance in what methods Officer Opelt did not employ. Pointing out that Officer Opelt would have more directly pursued the issue of intoxication by having defendant perform field sobriety tests or submit to a pat-down search for contraband, rather than by asking to search the car, the majority states the following proposition: "The degree to which an officer resorts to less probative investigatory techniques, in this case a request to search a vehicle for evidence of the driver's intoxication, informs our analysis of whether the use of the technique fundamentally changed the nature of the stop." Op. 359 Ill. App. 3d at 849. No specific citation is provided for this proposition. The majority apparently believes that it is a logical,

uncontroversial elaboration of *Terry/Gonzalez*, but I am doubtful. Some of the most invasive police actions--those most likely to change the fundamental nature of a stop--are also the most probative.

At this early point in its existence, *Gonzalez* itself remains the best guide to what *Gonzalez* says: " '*Terry*'s scope requirement is a common sense limitation on the power of law enforcement officers. It prevents law enforcement officials from fundamentally altering the nature of the stop by converting it into a general inquisition about past, present and future wrongdoing.' " *Gonzalez*, 204 Ill. 2d at 235, quoting *United States v. Holt*, 264 F.3d 1215, 1240 (10th Cir.2001) (Murphy, J., concurring in part and dissenting in part). Defendant was not subjected to a general inquisition, but to questions tailored for the narrow purpose of determining whether he was under the influence. To say, as does the majority, that Officer Opelt could have used a more probative method of pursuing his suspicion is to say nothing more than that Officer Opelt's conduct fell on a continuum. Where does *Terry/Gonzalez* draw the line on that continuum? The overarching criterion is common sense, and where an officer seeks to know whether a driver he suspects is under the influence of drugs has any such drugs in his possession, common sense is not offended but upheld. The majority would have preferred that Officer Opelt perform field sobriety tests or pat defendant down for contraband, but such methods are much more personally invasive than a request to search a car.

While I believe that Officer Opelt's actions clearly were justified under the first and third prongs of *Terry/Gonzalez* and therefore pass constitutional muster on that basis alone, I will discuss the second prong as it relates here, because I disagree with the majority on this point as well. The second prong asks whether the officer's action was supported by a reasonable and articulable suspicion of criminal activity. *Gonzalez*, 204 Ill. 2d

at 235. The majority contends that "neither defendant's behavior nor the visible areas of the car caused the officer to fear for his safety or suspect that defendant possessed contraband." Op. 359 Ill. App. 3d at 848. The majority acknowledges, however, that defendant, in addition to having driven erratically, "showed unusual nervousness and signs of disorientation." Op. 359 Ill. App. 3d at 848. These facts, combined with defendant's admission to having been in drug treatment recently, supported a reasonable suspicion that defendant was under the influence of drugs, even in the absence of the more commonly observed physical indicia of alcohol influence such as bloodshot and glassy eyes or lack of balance. That being so, Officer Opelt was justified in inquiring whether he could search the car, because, as I explained above, it was reasonable to suspect that defendant might have in his possession the same contraband that might have intoxicated him.

The majority's analysis of the relevant case law is also unconvincing. Contrary to the majority's claim, the present case is nothing like *Hall,* where the officer asked to search the defendant's car without having any indication that the defendant was guilty of anything other than the equipment violation for which the officer pulled him over. Here, by contrast, there were various signs that defendant was under the influence of drugs. The majority also fails to identify any material difference between this case and *Moore.* I disagree with the majority's conclusion that defendant's weaving within his lane and following another car too closely are "much weaker" indicators of driving under the influence than the erratic driving in *Moore,* which consisted of driving down the wrong side of the road at a high rate of speed. Op. 359 Ill. App. 3d at 847. Defendant's driving was at least as telling of impairment as the *Moore* defendant's driving, if not more so. Weaving within one's lane is such a common and probative indicator of driving under the influence that this district has formulated the following general rule: "Weaving, even within defendant's own lane, may provide

reasonable grounds for a *Terry* stop where the officer believes defendant may be under the influence of drugs or alcohol." *People v. Rosemeier,* 259 Ill. App. 3d 695, 697 (1994). I recognize that, unlike here, the officer in *Moore* observed furtive movements within the car. However, although the court in *Moore* considered the totality of the circumstances in judging the officer's questioning and request to search the car, it seems the court would have found the officer's action justified even if there was reason to suspect only that the defendant (the driver of the car) was under the influence: " Given these circumstances, it was reasonable for Officer Owens to suspect that the defendant may have been under the influence of a controlled substance and/ or alcohol, *or* that other criminal activity may have been in progress. * * * Consequently, we believe the scope of the stop was related to the circumstances that justified the interference in the first place." (Emphasis added.) *Moore,* 341 Ill. App. 3d at 810. Moreover, there was a fact present here that was absent in *Moore*: defendant's admission that he had been in drug rehabilitation recently.

For the foregoing reasons, I respectfully dissent from the majority's holding that Officer Opelt exceeded the scope of the *Terry* stop.